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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 364.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, AND C. W. MCDONNELL, FAY HARDING AND BEN C. LARKIN, AS MEMBERS OF AND CONSTITUTING SAID BOARD, AND JAMES MORRIS, AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY; MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, AND FARMERS GRAIN AND SHIPPING COMPANY, *Appellees.*

BRIEF OF THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA AMICUS CURIAE.

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Attorney General of the State of Minnesota.
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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned as counsel for the Railroad and Warehouse Commission of the State of Minnesota respectfully move this honorable court for leave to file the accompanying brief in this action as *amicus curiae.*

HENRY N. BENSON,
Attorney General of the State of Minnesota,
CHARLES E. PHILLIPS,
JOHN F. BONNER,
Assistant Attorneys General,
Counsel for Railroad and Warehouse Commission of the State of Minnesota as Amicus Curiae.

Supreme Court of the United States

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BRIEF OF THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA AMICUS CURIAE.

PRELIMINARY STATEMENT.

The Railroad and Warehouse Commission of the State of Minnesota is not concerned with the ultimate question as to whether the rates established by the order of May 8, 1929, of the board of railroad commissioners of North Dakota are lawful or unlawful. As the regulatory body of a sovereign state it is, however, vitally concerned with the question as to whether or not a federal court may suspend an intra-

state rate regularly promulgated by it, on the alleged ground that such rate is unlawful and void, under the provisions of the Interstate Commerce Commission Act, pending a hearing and determination thereof by the Interstate Commerce Commission.

STATEMENT OF THE CASE.

On May 8, 1929, the board of railroad commissioners of North Dakota fixed a scale of intrastate distributing or jobbing class rates ten per cent lower than the existing class rates to apply between all jobbing and distributing points in North Dakota and to and from such distributing and jobbing points, and to apply as maxima at intermediate points. Before the order could become effective the appellees filed a bill in equity in the district court of the United States for the district of North Dakota, alleging that the rates so established by said order will unjustly discriminate against persons and localities in interstate commerce and constitute an unreasonable burden on interstate commerce.

The bill recites the pendency of an investigation before the Interstate Commerce Commission, known as Docket 17000, Rate Structure Investigation, which has for its object the investigation of the rate structure throughout the United States and the leveling of rates and the removal of any discrimination which the Commission might find to exist between interstate and intrastate rates; the pendency before the Commission of a proceeding under Section 13 of the Interstate Commerce Act to determine whether or not the scale of class rates required by the order of May 8, 1929, will unjustly discriminate against persons and localities in interstate commerce or constitute a burden on interstate commerce.

The bill contains allegations of claimed irreparable injury and lack of adequate remedy at law and prays for an injunction restraining the operation of the order of May 8, 1929, until the Interstate Commerce Commission shall have passed on the question of whether or not the intrastate rates fixed by the order of the North Dakota commission are discriminatory and unduly burdensome on interstate commerce. An interlocutory injunction pending the final hearing in the present case is also asked (R. 1-14).

A three judge court, convened pursuant to Section 266 of the Judicial Code, granted an interlocutory injunction restraining the operation of the order of May 8, 1929,

> "until the Interstate Commerce Commission has determined, either in its Docket 17000, Part 2, now pending for decision, or in the proceeding under Section 13 of the Interstate Commerce Act which the plaintiffs herein have petitioned the Interstate Commerce Commission to institute, the question of whether the establishment and collection of the intrastate distributing or jobbing scale of class rates prescribed in said order of May 8, 1929, causes any undue or unlawful advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or in undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and until the further order of this court" (R. 88).

This restraining order was made effective upon the filing by appellees of bonds aggregating $150,000.

The court in its opinion recognized that it had no jurisdiction to determine the questions of whether or not the rates promulgated by the order of the board of railroad

commissioners of North Dakota are discriminatory or unduly burdensome to interstate commerce but granted the injunction solely on the ground that irreparable injury would result to appellees if the rates are allowed to go into effect and the Interstate Commerce Commission should hold them to be unlawful.

Great Northern Railway Co., et al., vs. Board of Railroad Commissioners of North Dakota, et al., 33 Fed. (2d) 934.

STATEMENT OF FACTS.

We accept the statement of facts contained in the brief of appellants.

ARGUMENT.

This brief will be primarily confined to a consideration of appellants' 7th specification of error, to-wit:

> "VII. That the court erred in enjoining and restraining the defendants and appellants until the Interstate Commerce Commission has made a determination, either in its Docket 17000, Part 2, now pending for decision, or in the proceedings under Section 13 of the Interstate Commerce Act, or until the further order of the Court" (pp. 9-10, Appellant's Brief).

Exclusive jurisdiction ultimately to determine whether an intrastate rate is void under the provisions of the Interstate Commerce Act is vested in the Interstate Commerce Commission. We respectfully submit that the courts, both federal and state, are without jurisdiction to suspend an intrastate rate, regularly promulgated by state authority, until the Interstate Commerce Commission has determined such rate to be unlawful and void under the authority vested in it.

No relief can be granted shipper or carrier by any court in advance of such determination.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Baltimore & Ohio Ry. Co. vs. Pitcairn, 215 U. S. 481.

Columbus Iron and Steel Co. vs. Kanawha & M. Ry. Co. (C. C. A., 4th Circuit), 178 Fed. 261.

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Wickwire Co. vs. N. Y. Central Co. (C. C. A., 2nd), 181 Fed. 316.

Atlantic Coast Line Ry. vs. Macon Grocery Co. (C. C. A., 5th Circuit), 166 Fed. 206.

Atchison, etc., Ry. Co. vs. Foster Lbr. Co., 31 Okla. 661.

The following cases support the principle that where the Interstate Commerce Commission is charged with administrative duties no ~~justiciable~~ material question arises until the commission has acted.

Texas & Pacific Ry. Co. vs. Gulf Ry. Co., 270 U. S. 266.

Northern Pacific Ry. Co. vs. Solum, 247 U. S. 477.

Loomis vs. Lehigh Valley Ry. Co., 240 U. S. 43.

Robinson vs. B. & O. Ry. Co., 222 U. S. 506.

Western R. R. Co. vs. Georgia, 267 U. S. 493.

In *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., supra*, this court, after an extensive discussion and review of the authorities, held that no action for reparation could be maintained by a shipper in a state court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those fixed by the carrier according to the act and had not been found unreasonable by

the Interstate Commerce Commission.

Baltimore & Ohio Ry. Co. vs. United States ex rel. Pitcairn, supra, involved the right of a court to issue a writ of mandamus requiring a railroad company to cease from subjecting certain coal companies to undue and unreasonable discrimination in car service for the shipping and transporting of coal. This court held that in the absence of a finding by the Interstate Commerce Commission of discrimination the court had no jurisdiction to issue the writ. After discussing the Abilene case, the court say (page 500):

> "Nor is there anything in the contention that the decision in *Southern Ry. Co. vs. Tift*, 206 U. S. 428 [27 Sup. Ct. 709, 51 L. Ed. 1124], qualifies the ruling in the Abilene case, and is an authority supporting the right to resort to the courts in advance of action by the commission for relief against unreasonable rates or unjust discriminatory practices, which, from their nature, primarily require action by the commission."

Mr. Justice Harlan in a dissenting opinion in *Macon Grocery Co. vs. Atlantic Coast Line Railroad Company*, 215 U. S. 501, cites the case of *Baltimore & Ohio Ry. Co. vs. Pitcairn*, as authority for the proposition that *no relief* can be obtained by an original suit in any court, federal or state, from rates claimed to be discriminatory until discrimination has been found by the Interstate Commerce Commission. In this case the Circuit Court of Appeals held that as the Interstate Commerce Commission had been given exclusive jurisdiction in the first instance to determine the reasonableness of interstate rates by the Interstate Commerce Act no shipper could maintain a suit in equity to prevent the filing or enforcement of a schedule of rates or a change to unjust or unreasonable rates pending determination of

the reasonableness thereof by the Commission. The case was appealed to the Supreme Court of the United States where it was disposed of upon the ground that the Circuit Court of Appeals had no jurisdiction of the defendants. Mr. Justice Harlan dissented, taking the position that this court should have disposed of it upon the merits and held that the court had no jurisdiction to grant any relief on the ground of claimed rate discrimination until that question had been decided by the Interstate Commerce Commission. He says on page 511:

> "It seems to me that this case could have been disposed of upon the authority of *Baltimore & Ohio Railroad Co. vs. Pitcairn Coal Co.*, recently decided, *ante*, page 481, *in which the court held, in substance, that shippers, who complain of rates adopted by interstate carriers, cannot obtain relief by an original suit brought in any court, federal or state,* but must make application, at the outset, to the Interstate Commerce Commission. This, I think, is all that need have been said; for, whatever interpretation was given to the Judiciary Act of 1888 (25 Stat. 433) the Circuit Court would have been required, under the case just cited, to decline jurisdiction." (Italics ours.)

From the foregoing it is apparent that at least one member of this court has cited the case of *Baltimore & Ohio Ry. Co. vs. United States* as authority for the broad principle, which we are here contending, that no court has any jurisdiction to afford any relief on the ground of alleged discrimination in rates until the Interstate Commerce Commission has decided that the rates are discriminatory.

The precise question involved here has been presented to the Circuit Courts of Appeal of the various circuits. The

cases from the Circuit Courts of Appeal which we have cited on page 6 of this brief involved actions by shippers against railway companies to prevent the publishing of tariffs increasing interstate rates. Under the law, as it then stood, the publication and filing of a tariff by a railroad company authorized such company to charge the rates contained in the tariff until the Interstate Commerce Commission found the rates to be unreasonable. In each of these cases the Circuit Courts of Appeal held that a court of equity has no power in advance of a decision by the Interstate Commerce Commission, holding such rates to be unreasonable, to issue an injunction to prevent their going into effect.

In *Columbus Iron and Steel Co. vs. Kanawha & M. Ry. Co., supra*, the contention that unless such an injunction is granted the shipper will suffer irreparable injury was disposed of in the following language:

> "It is contended with much force that the complainant, pending a determination of the question involved herein by the Interstate Commerce Commission, will suffer irreparable injury, and that it will be compelled to suspend business, owing to the alleged unfair competition involved in the proposed rates, and that the injury thus sustained will be of such a character that a judgment for damages cannot fully compensate it for the losses it may sustain. While this may be true, nevertheless, it is the duty of the court to construe the law as it finds it. It is not within our province to repeal a law that may be objectionable. Neither can the Court exceed the limitations fixed by Congress in defining its jurisdiction" (pp. 265-266).

In *Wickwire Steel Co. vs. New York Central Ry. Co., supra*, the court, in holding adversely to the contention of a

shipper that Section 22 of the Interstate Commerce Act provided that nothing in the act contained "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies" vests a court of equity with jurisdiction to issue such a restraining order pending the determination of the validity of the rates by the Interstate Commerce Commission, uses the following language:

> "These broad provisions would apparently justify the exercise by the court of any of its inherent powers in behalf of persons complaining of any violations by carriers of the act; but the supreme court has held in *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, that they are to be construed with reference to and limited by the powers conferred by Congress upon the Interstate Commerce Commission, for the purpose of insuring and enforcing the establishment and maintenance of reasonable and uniform rates. *In other words, they are to be construed as intended to redress wrongs that need not be complained of in the first instance to the Interstate Commerce Commission.*" (Italics ours.) (p. 318.)

THE APPELLEES AT THE TIME OF THE COMMENCEMENT OF THIS ACTION HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW IN THE STATE OF NORTH DAKOTA.

In addition to the authorities for this statement cited on page 45 of appellant's brief, we wish to invite the court's attention to the following cases:

Prentis vs. Atlantic Coast Line, 211 U. S. 210.

Gilchrist vs. Interborough Rapid Transit Co., 279 U. S. 159.

CONCLUSION.

Upon the authorities and reasons hereinbefore set forth, we respectfully submit that the court below had no authority to issue the injunction and that appellees at the commencement of this action had a plain, adequate and complete remedy at law in the state of North Dakota.

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